



January 10, 2006

**Re: Oppose the nomination of Judge Samuel Alito**

Dear Judiciary Committee member:

On behalf of the thousands of members of Friends of the Earth, I urge you to oppose the nomination of Judge Samuel Alito to a lifetime seat on the Supreme Court.

When it comes to the constitutional questions that will determine the ability of Congress to enact environmental laws and that of citizens to access courts to enforce them, Judge Samuel Alito poses a clear threat to the environmental protections that Americans depend on. And because he has been nominated to replace Justice Sandra Day O'Connor, a swing vote who frequently voted to uphold strong environmental laws, Judge Alito could tip the Court's balance against the environment if confirmed. His record includes several troubling aspects:

**Narrow view of congressional power threatens environmental laws.** In the coming months the Court will decide two cases challenging the authority of Congress to regulate a majority of wetlands, streams, ponds and other waterways now protected by the Clean Water Act. Judge Alito's record demonstrates an untenably narrow view of congressional authority under the Commerce Clause, the backbone of the Clean Water Act, Endangered Species Act, Safe Drinking Water Act and a host of other laws that protect our air, land and water.

Judge Alito's dissent in United States v. Rybar<sup>1</sup> indicates an extremely cramped view of the federal government's ability to legislate in the public interest. Five other appeals courts disagreed with Alito's conclusion that Congress lacked Commerce Clause authority to criminalize the possession of machine guns, placing his restrictive view squarely outside the federalism mainstream. Earlier in his career Alito urged President Reagan to veto the Truth in Mileage Act, which criminalized tampering with odometers in used cars and expressly dealt with matters of interstate commerce. Alito stated that the law "violates the principles of federalism," and that "it is the states, not the federal government, that are charged with protecting the health, safety and welfare of their citizens."<sup>2</sup>

**Restrictive view of standing doctrine threatens citizen access to courts.** In Public Interest Research Group v. Magnesium Elektron, Inc.<sup>3</sup>, Judge Alito espoused a restrictive view of the constitutional standing doctrine, making it harder for citizens to sue polluters. Citizen enforcement is an indispensable feature of the Clean Water Act, Clean Air Act, Superfund and many other laws that protect our health and safeguard our natural resources. These citizen suits empower ordinary Americans to sue polluters when government lacks the resources or political will to enforce the law.

The opinion Alito joined in Magnesium Elektron held that environmentalists lacked standing to sue because they hadn't established scientific proof of environmental harm—even though it was

<sup>1</sup> 103 F.3d 273 (3d Cir. 1996)

<sup>2</sup> Available at <http://www.reagan.utexas.edu/alito/8097.pdf>

<sup>3</sup> 123 F.3d 111 (3d Cir. 1997)

uncontested that the company committed 150 violations of the Clean Water Act, and even though environmental groups had demonstrated injury to the individual plaintiffs they represented. The Supreme Court rejected this reasoning in Friends of the Earth v. Laidlaw<sup>4</sup>, holding that the proper measure of standing is injury to the plaintiff—not the environment. However, two dissenting justices and one concurring justice in Laidlaw left open the door to future challenges of environmental citizen suits. Replacing Justice O'Connor, who voted with the Laidlaw majority, with Judge Alito could quickly tip the Court's balance away from support of citizen enforcement of environmental laws.

**Favorable EPA decisions overruled despite deferential standard of review.** Alito has sided with environmentalists in some cases that turned on interpretation of an environmental statute. But in others he sided with polluters and invalidated pro-environment EPA decisions, despite the fact that courts are supposed to defer to the expertise of agencies. He has not invalidated agency decisions under this deferential standard of review in challenges brought by citizen groups, demonstrating a one-sided willingness to overturn agency actions when it benefits polluters.

For example, in W.R. Grace v. EPA<sup>5</sup> Alito provided the decisive vote to overturn an EPA emergency cleanup order under the Safe Drinking Water Act, siding with a polluter who challenged a health-based plan to remove toxic ammonia pollution from an aquifer providing drinking water to 180,000 people. Alito voted to overturn the plan, which was developed by local, state and federal agencies, despite a highly deferential standard of review.

Judge Alito has been nominated to replace Justice Sandra Day O'Connor, who served as a pivotal vote in favor of the environment. Confirming him to a lifetime appointment would threaten the ability of Congress to enact strong federal environmental laws, and would jeopardize laws such as the Clean Water Act that Americans have depended on for more than 30 years. His record also raises significant concerns about his commitment to upholding citizen enforcement of environmental laws. The stakes are simply too high to entrust a lifetime appointment to Judge Alito. I urge you to oppose his nomination. If you have questions, please feel free to contact me or our legislative director, Sara Zdeb, at 202-222-0728.

Sincerely,



Brent Blackwelder  
President

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<sup>4</sup> 528 U.S. 167 (2000)

<sup>5</sup> 261 F.3d 330 (3d Cir. 2001)